

## Message Text

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PAGE 01 OECD P 28559 01 OF 03 021523Z

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ACTION EB-07

INFO OCT-01 AF-04 ARA-06 EUR-12 EA-06 NEA-06 IO-10 ISO-00

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INFO AMEMBASSY ANKARA

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PAGE 02 OECD P 28559 01 OF 03 021523Z

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C O R R E C T E D C O P Y REFERENCE (E)

E.O. 11652: N/A  
TAGS: EFIN, OECD  
SUBJECT: FINAL INVISIBLES COMMITTEE DISCUSSION OF UN  
LINER CODE OF CONDUCT, NOV. 22

REFS: (A) STATE 257320  
(B) GENEVA 7096  
(C) USOECD 27811  
(D) USOECD 27000  
(E) OECD PARIS 26927  
(F) OECD DOC. C(74)135

1. SUMMARY: INVISIBLES COMMITTEE (IC) CONCLUDED ITS REPORT TO COUNCIL ON COMPATIBILITY OF UN LINER CODE OF CONDUCT AND OECD INVISIBLES CODE WITH SLIM MAJORITY FINDING THAT TWO INSTRUMENTS ARE INCOMPATIBLE. (ADVANCE COPY OF FINAL REPORT BEING HAND CARRIED TO WARREN CLARK, EUR/RPE). US SUCCEEDED IN GETTING STATEMENT ADOPTED BY FULL COMMITTEE THAT "APPROPRIATE UNITED NATIONS BODIES SHOULD BE INVITED TO PROVIDE FURTHER CLARIFICATION OF UN CONVENTION", BUT WAS UNABLE TO HOLD MAJORITY TOGETHER ON RECOMMENDATION THAT OECD MEMBERS NOT SIGN CONVENTION UNTIL AUTHORITATIVE UN INTERPRETATION. IC REPORT WILL NOW GO TO PAYMENTS COMMITTEE (PC) ON DECEMBER 9 FOR LIMITED OFFICIAL USE

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PAGE 03 OECD P 28559 01 OF 03 021523Z

EXPOSURE TO POLITICAL VIEWS OF ALL OECD MEMBERS. SINCE IC EXPERTS WERE STRONGLY DIVIDED ON INTERPRETATION OF COMPATIBILITY, IT IS UNLIKELY PC OR SUBSEQUENTLY COUNCIL WILL MAKE RECOMMENDATION TO OECD MEMBERS NOT TO SIGN CONVENTION. END SUMMARY.

2. US CONTINUED TO PLAY MAJOR ROLE IN CORRIDOR AND COMMITTEE DISCUSSIONS AIMED AT PRESERVING MAJORITY FINDING

OF INCOMPATIBILITY. AT FINAL ROLL CALL, MAJORITY SURVIVED WITH SEVEN OUT OF TWELVE EXPERTS FINDING INCOMPATIBILITY FOR REASONS OUTLINED IN MAJORITY OPINION (REF C) (US, UK, SWITZERLAND, NORWAY, FINLAND, AUSTRIA AND GERMANY). ONE ADDITIONAL MEMBER FOUND INCOMPATIBILITY FOR OTHER REASONS (BELGIUM), THREE FOUND NO INCOMPATIBILITY (FRANCE, JAPAN, SPAIN), AND ONE WAS UNDECIDED (ITALY). IT IS NOTEWORTHY THAT BOTH GERMAN AND BELGIAN REPS EXERCISED THEIR RIGHT TO ACT AS INDEPENDENT EXPERTS TAKING POSITIONS ON MERITS OF CASE RATHER THAN REFLECTING POLITICAL VIEWS EXPRESSED BY THEIR REPRESENTATIVES IN MARITIME TRANSPORT COMMITTEE. WHEN IC REPORT GETS TO PC, THEY (AND ITALY) MAY WELL CHANGE SIDES AND FAVOR SIGNATURE OF CONVENTION FOR POLITICAL REASONS.

3. IT CAN BE EXPECTED THAT SOME COUNTRIES, INCLUDING POSSIBLY SOME MEMBERS OF IC MAJORITY, MAY SEEK IN PC OR COUNCIL TO FIND COMPROMISE SOLUTION WHICH WOULD PERMIT SIGNATURE OF CONVENTION ON BASIS OF RECOGNITION BY SIGNATORIES THAT IMPLEMENTATION MUST BE ON NON-DISCRIMINATORY BASIS SO THAT OBLIGATIONS UNDER OECD CODE WILL NOT BE VIOLATED. MAJORITY VIEW IN REFDOC, WHICH US WILL CONTINUE TO UPHOLD, IS THAT SUCH COMPROMISE IS NOT POSSIBLE SINCE IN CERTAIN CIRCUMSTANCES IMPLEMENTATION OF CONVENTION RULES WOULD INVOLVE UNAVOIDABLE CONFLICTS WITH OECD CODE.

4. US WILL SEEK IN PC AND COUNCIL, PER REF A, TO OBTAIN SUPPORT FOR DRAFT ENTRY IN COUNCIL MINUTES CALLING FOR

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PAGE 01 OECD P 28559 02 OF 03 272243Z

12

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INFO OCT-01 AF-04 ARA-06 EUR-12 EA-06 NEA-06 IO-10 ISO-00

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PAGE 02 OECD P 28559 02 OF 03 272243Z

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FURTHER CLARIFICATCN OF UN CONVENTION BY APPROPRIATE

UNITED NATION BODIES. SEPTTEL TRANSMITS PROPOSED DRAFT ENTRY FOR DEPARTMENT'S COMMENTS.

5. MAJOR POINTS OF INTEREST IN IC REPORT, AND SIGNIFICANCE FOR PC DISCUSSIONS, FOLLOW IN PARAGRAPHS BELOW.

6. CHAPTER II MAIN ISSUES: US EXPERT SOUGHT TO TONE DOWN PARAS 28-32 ON OECD CODE OBLIGATIONS WITH REGARD TO EXISTING LINER CONFERENCES. US HAD SOUGHT EARLIER TO POSTPONE DISCUSSION ON QUESTION, WHETHER NOTE 1 OF OECD CODE CREATES OBLIGATIONS FOR GOVERNMENTS TO REGULATE RESTRICTIVE PRACTICES OF LINER CONFERENCES, OR WHETHER SUCH REGULATORY EFFORTS FALL OUTSIDE SCOPE OF CODE. FINAL VERSION OF REFDOC SUPPORTS VIEW THAT NOTE 1 CREATES NO OBLIGATION TO REGULATE, BUT DOES NOT PREVENT GOVERNMENTS FROM REGULATING AS LONG AS THEY USE MEANS COMPATIBLE WITH CODE. US EFFORTS TO DELETE PARA 29 WERE UNSUCCESSFUL, ALTHOUGH SOME TIGHTENING OF LANGUAGE IN PARA 32 WAS ACHIEVED. FOR FURTHER DISCUSSION THIS POINT SEE SEPTTEL.

7. CHAPTER II MAIN ISSUES: MINORITY GROUP SUCCEEDED IN OBTAINING COMMITTEES AGREEMENT IN PARA 39 THAT IC IS NOT QUALIFIED TO GIVE AUTHORITATIVE INTERPRETATION OF ALL CONTESTED POINTS IN UN CONVENTION (US INSERTED LIMITED OFFICIAL USE

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PAGE 03 OECD P 28559 02 OF 03 272243Z

"ALL" AS MODIFIER), PENDING CLARIFICATION BY TEST OF PRACTICE AND BY COURT DECISIONS. THIS INSERTION ALLOWS MINORITY TO EMPHASIZE THAT JUDGMENTS AND COMPATIBILITY WILL HAVE TO AWAIT TEST OF EVENTUAL PRACTICES WHILE MAJORITY CAN SAY THAT SOME CONTESTED POINTS ARE ALREADY CLEAR.

8. PARAS 44 - 46 (DRAFTED LARGELY BY US) CONTAIN MAJORITY VIEW THAT CONVENTION IS MANDATORY AND IS ENFORCEABLE, WHILE PARAS 47-49 (DRAFTED LARGELY BY FRENCH) CONTAIN MINORITY VIEW THAT CONVENTION IS BASICALLY GUIDELINE WHICH CREATES NO OBLIGATIONS FOR GOVERNMENTS WHEN CONFERENCES AGREE PRIVATELY TO ADOPT CONVENTION RULES, AND IS UNENFORCEABLE WHEN DISPUTES ARISE BECAUSE GOVERNMENTS HAVE NO OBLIGATION TO ENFORCE CONCILIATION RECOMMENDATIONS AGAINST PARTIES TO DISPUTES WHICH DO NOT ACCEPT THEM. THIS ARGUMENT IS REFUTED IN DETAIL IN MAJORITY VIEW ON ENFORCEABILITY IN PARAS 45 AND 68.

9. MINORITY ALSO TOOK EXCEPTION TO VIEW THAT CARGO-SHARING PROVISIONS IN ARTICLE 2 WILL NORMALLY TEND TO 40:40:40 DIVISION OF TRADE BETWEEN NATIONAL SHIPPING LINES AND THIRD COUNTRIES, SINCE SHIPPING LINES ARE FREE TO MUTUALLY AGREE OTHERWISE IF THEY SO DESIRE.

MAJORITY NOTED THAT NATIONAL SHIPPING LINES COULD AT ANY TIME INSIST ON 40 PERCENT OF THE TRADE BY SIMPLY NOT AGREEING OTHERWISE. IT IS POSSIBLE THAT SOME POTENTIAL OECD SIGNATORIES OF CONVENTION, NOTABLY AUSTRALIA AND NEW ZEALAND, MAY TAKE POSITION IN PC AND COUNCIL THAT THEY HAVE NO INTENTION OF CLAIMING FULL 40 PERCENT, AND WOULD BE CONTENT WITH INCREASING THEIR SHARE OF NATIONAL TRADE TO MODEST LEVEL OF 10 PERCENT OR SO, THUS AVOIDING CONFLICT WITH OECD CODE OBLIGATIONS. HOWEVER, AS US POINTED OUT IN IC, THERE IS NOTHING TO KEEP NATIONAL LINES THEMSELVES FROM CLAIMING LARGER SHARE IF THEY SO DESIRE, AND ANY DISPUTE INVOLVING INTERNATIONAL CONCILIATION OR DOMESTIC COURT ACTION WOULD HAVE TO SUPPORT THEIR RIGHT UNDER CONVENTION TO OBTAIN UP TO 40 PERCENT OF TRADE.

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PAGE 04 OECD P 28559 02 OF 03 272243Z

10. AT SECRETARIAT INITIATIVE, PARAS 60 - 64 ON ROLE OF NON-CONFERENCE LINERS WERE ADOPTED BY FULL COMMITTEE. THESE PARAS RECOGNIZE IMPORTANT FACT THAT CONTRACTING PARTIES TO UN CONVENTION COULD LIMIT TRAFFIC CARRIED BY NON-CONFERENCE LINERS BY DETERMINING THAT SUCH CONFERENCES ARE NOT IN COMPLIANCE WITH "PRINCIPLE OF FAIR COMPETITION ON COMMERCIAL BASIS". SINCE GOVERNMENTS ARE SOLE JUDGES OF WHAT CONSTITUTES FAIR COMPETITION, NON-CONFERENCE LINERS HAVE NO RECOURSE IN EVENT OF DISAGREEMENT, GOVERNMENTS COULD RESERVE TO CONFERENCES, INCLUDING THEIR NATIONAL LINES, WHATEVER PORTION OF TOTAL TRAFFIC THEY WANTED THEM TO CARRY. THIS ARGUMENT GOES FAR TO DEMOLISH MINORITY LINE OF REASSURING THAT FREEDOM OF TRANSACTIONS IS NOT LIMITED BY UN CONVENTION COVERING CONFERENCES BECAUSE SHIPPERS CAN ALWAYS USE NON-CONFERENCE LINES.

11. CHAPTER IV: THIS CHAPTER IN ITS FINAL FORM

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PAGE 01 OECD P 28559 03 OF 03 272243Z

12

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PAGE 02 OECD P 28559 03 OF 03 272243Z

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CONTAINS LENGTHY MAJORITY OPINION (DRAFTED BY US) WHICH CONCLUDES THAT (1) UN CONVENTION CREATES MANDATORY OBLIGATION FOR SIGNATOIRES (2) THAT IT IS ENFORCEABLE, (3) THAT IT CONTAINS DISCRIMINATORY PROVISIONS, AND (4) THAT THESE DISCRIMINATORY PROVISIONS ARE INCOMPATIBLE WITH LIBERALIZATION REQUIREMENTS OF OECD CODE. MINORITY OPINION TAKES OPPOSITE VIEW ON ALL POINTS. ONE IC MEMBER (BELGIUM) SUBMITTED INDEPENDENT VIEW WHICH CONCLUDES THAT INCOMPATIBILITY WOULD RESULT FROM COUNCIL'S INABILITY TO SECURE REMOVAL OR MODIFICATION OF INTERNAL ARRANGEMENTS BASED ON UN CONVENTION WHICH ARE CAUSING INJURY TO ANOTHER MEMBER STATE (ARTICLE 16 OF OECD CODE).

12. IN ABSENCE OF SUMMARY AND CONCLUSIONS, MOST CRUCIAL PART OF IC REPORT IS FINAL COMMENTS SECTION AT END OF CHAPTER IV (PARAS 97-10L). PARA 98 NOTES THAT "ALL MEMBERS OF THE COMMITTEE RECOGNIZE THAT THERE EXIST POSSIBILITIES OF CONFLICT BETWEEN UN CONVENTION AND THE OECD CODE". PARA 99 INCLUDES AN OPINION THAT IN EVENT OF CONFLICT, CONTROLLING OBLIGATION WOULD BE OECD CODE (SEE BELOW). FINALLY, AT US SUGGESTION, IC AGREED TO FOLLOWING PARAGRAPH, WHICH PROVIDES BASIS FOR HOPE THAT COUNCIL MIGHT ACCEPT DRAFT ENTRY PROPOSING FURTHER STUDY BY UNITED NATIONS OR OTHER LEGAL BODIES:  
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PAGE 03 OECD P 28559 03 OF 03 272243Z

QUOTE PARA 10L. IN VIEW OF THE DIFFERENCES OF INTERPRETATION MENTIONED ABOVE, THE COMMITTEE FOR INVISIBLE TRANSACTIONS CONSIDERS THAT THE APPROPRIATE BODIES OF THE UNITED NATIONS SHOULD BE INVITED TO PROVIDE FURTHER CLARIFICATION OF THE UNITED NATIONS CONVENTION. END QUOTE

13. US SOUGHT TO INCORPORATE THIS STATEMENT IN A DRAFT ENTRY FOR COUNCIL MINUTES TO BE INCLUDED IN IC REPORT, BUT WAS UNABLE TO CARRY MAJORITY ALONG BECAUSE PACKAGE INCLUDED RECOMMENDATION THAT MEMBER COUNTRIES NOT SIGN CONVENTION UNTIL UN STUDY COMPLETED. THIS WAS UNACCEPTABLE TO GERMANS WHO BOLTED MAJORITY AND SIDED WITH MINORITY ON PROCEDURAL VOTE TO DELETE DRAFT ENTRY ALTO-



GETHER. RESULTING SIX-SIX SPLIT OF IC MEMBERS KILLED PROPOSAL. MAIN OBJECTION OF MINORITY TO IDEA OF UN STUDY WAS THAT SAME SPLIT ON POLITICAL LINES WOULD RESULT IN UN. MAJORITY NOTED THAT THIS IMPLIED THERE WAS NO SOURCE OF AUTHORITATIVE INTERPRETATION OF MEANING OF CONVENTION, NOT EVEN AUTHORS THEMSELVES, AND NO BETTER REASON FOR NOT SIGNING CONVENTION COULD EXIST. SEPTEL TRANSMITS NEW DRAFT ENTRY WHICH MISSION WOULD LIKE TO SEE ADOPTED IN PAYMENTS COMMITTEE.

14. QUESTION OF CONTROLLING OBLIGATION IN CASE OF CONFLICT LED TO LENGTHY DISCUSSION OF WHETHER SOME OECD MEMBERS WOULD HAVE LEGAL RIGHT TO AGREE AMONG THEMSELVES NOT TO APPLY OECD CODE OBLIGATIONS. TO DISMAY OF MOST MEMBERS OF IC, OECD LEGAL ADVISER, DICK SCOTT, CONFIRMED THAT SOME BUT NOT ALL OECD MEMBERS WOULD HAVE LEGAL RIGHT TO ENTER INTO AGREEMENT AMONG THEMSELVES NOT TO APPLY AN EARLIER AGREEMENT. (SEE ARTICLE 30 OF GENEVA CONVENTION ON LAW OF TREATIES). IC RECOGNIZED THAT SUCH ACTION COULD SABOTAGE OECD CODE, AND COULD PROVIDE BASIS FOR POTENTIAL SIGNATORIES OF UN CONVENTION TO OPT OUT OF THEIR OECD OBLIGATIONS TO LIBERALIZE. IT IS VERY POSSIBLE THAT AUSTRALIAN OR SOME OTHER COUNTRY FAVORING SIGNATURE MAY RAISE THIS ISSUE IN PC OR COUNCIL.

15. CHAPTER V: FINAL CHAPTER ON REMEDIES IN CASE OF CONFLICT WAS RETAINED, WITH FOUR ALTERNATIVES BRIEFLY OUTLINED. THESE WERE (1) NOT TO SIGN CONVENTION, (2) TO LIMITED OFFICIAL USE

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PAGE 04 OECD P 28559 03 OF 03 272243Z

SIGN CONVENTION UNDER RESERVATION THAT NO OBLIGATIONS IN CONFLICT WITH OECD CODE WOULD APPLY, (3) TO SEEK MODIFICATION IN CONVENTION, AND (4) TO MODIFY OECD CODE. AT MINORITY INSISTENCE, FINAL PARAGRAPH ADDED TO EFFECT THAT OTHER POSSIBLE REMEDIES MIGHT BE ENVISAGED WHAT MARITIME TRANSPORT COMMITTEE COULD BE INVITED TO CONSIDER. THIS MAY BE USED AS POSSIBLE BASIS FOR COMPROMISE IN COUNCIL DESIGNED TO GET POTENTIAL SIGNATORIES OFF INCOMPATIBILITY HOOK.

TURNER

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## Message Attributes

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**Disposition Approved on Date:**  
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**Reference:** 74 STATE 257320, 74 GENEVA 7090, 74 OECD PARIS 27811, 74 OECD PARIS 27000, (A) STATE 257320  
**Review Action:** RELEASED, APPROVED  
**Review Authority:** golinofr  
**Review Comment:** n/a  
**Review Content Flags:**  
**Review Date:** 27 MAR 2002  
**Review Event:**  
**Review Exemptions:** n/a  
**Review History:** RELEASED <27 MAR 2002 by kelleyw0>; APPROVED <28 MAY 2002 by golinofr>  
**Review Markings:**

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US Department of State  
EO Systematic Review  
30 JUN 2005

**Review Media Identifier:**  
**Review Referrals:** n/a  
**Review Release Date:** n/a  
**Review Release Event:** n/a  
**Review Transfer Date:**  
**Review Withdrawn Fields:** n/a  
**Secure:** OPEN  
**Status:** NATIVE  
**Subject:** FINAL INVISIBLES COMMITTEE DISCUSSION OF UN LINER CODE OF CONDUCT NOV 22  
**TAGS:** EFIN, OECD  
**To:** STATE  
**Type:** TE  
**Markings:** Declassified/Released US Department of State EO Systematic Review 30 JUN 2005